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13 LinkedIn Corporation

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION
17

18 3taps, Inc.,

19 Plaintiff,

20 vs.

21 LinkedIn Corporation,

22 Defendant.
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Case No. 18-cv-00855-EMC

**DEFENDANT LINKEDIN'S REPLY IN
SUPPORT OF MOTION TO DISMISS
PLAINTIFF'S AMENDED
COMPLAINT**

Judge: Hon. Edward M. Chen
Hearing Date: April 7, 2022
Hearing Time: 1:30 p.m.
Ctrm: Courtroom 5
Trial Date: None Set

INTRODUCTION

3taps, Inc. spins three tales in its Opposition (Dkt. 63) to manufacture Article III standing. It is apparent from the face of the Amended Complaint and judicially noticeable documents that each of these stories is implausible and cannot serve as a credible basis for an actual case or controversy.

First, 3taps claims that an actual controversy exists because it was forced to sue after it received a “threat of ruinous litigation” from LinkedIn. Opp. at 3. The pre-suit correspondence plainly belies this claim. 3taps contacted LinkedIn out of the blue through a single pre-suit letter and LinkedIn’s response made clear that it had no present intention to pursue legal action against 3taps. And, of course, LinkedIn never did sue 3taps.

Second, 3taps contends that it sufficiently alleged that it had a real, concrete plan to conduct business using data from LinkedIn’s platform. But the Amended Complaint is devoid of any plausible allegations indicating that 3taps had a concrete intention to scrape LinkedIn and, as a result, that it would suffer a concrete injury if it was prohibited from doing so. Rather, it contains only a vague assertion that 3taps may someday decide to scrape LinkedIn in some undisclosed manner for some unknown purpose. In its Opposition, 3taps concedes it offered no more concrete plans, arguing that for Article III purposes all it has to say is that LinkedIn data has a value that it would like to exploit without revealing how or why. This is nonsense. The fact that data on LinkedIn’s servers may be valuable to others does not give anyone and everyone the right to force LinkedIn into court over wholly speculative uses of that data. In any event, 3taps has not alleged sufficient facts for this Court to assess the legality of 3taps’s theoretical conduct.

Third, 3taps maintains the fiction that this case is related to the *hiQ* case and that the relationship itself shows that a controversy exists between LinkedIn and 3taps. 3taps cannot derive standing to sue from someone else’s case. That is especially true where 3taps and hiQ had nothing to do with each other until 3taps’s CEO invested in hiQ in 2018, after the hiQ lawsuit and preliminary injunction request that were *filed by hiQ, not LinkedIn*. After the preliminary injunction was granted, 3taps promptly invested in hiQ to manufacture a supposedly similar controversy with LinkedIn. The hiQ injunction was based on alleged unfair competition, where

1 3taps does not even have a business model or make such a claim. There are obvious material
2 differences.

3 None of 3taps's tales withstand scrutiny. 3taps has failed to demonstrate an actual
4 controversy, and as such, the Court lacks Article III jurisdiction. But even if jurisdiction exists,
5 the sequence of events gives rise to a strong inference that this lawsuit was manufactured so that
6 3taps could forum shop to avoid an existing permanent injunction issued by Judge Breyer. This
7 Court should not exercise its discretionary jurisdiction under such circumstances. 3taps's
8 Amended Complaint should be dismissed without leave to amend.

9 **ARGUMENT**

10 **I. 3TAPS'S OPPOSITION CONFIRMS THAT IT LACKS ARTICLE III STANDING.**

11 **A. 3taps Attempts to Manufacture An "Implied Threat" of Litigation Where** 12 **There Is None.**

13 3taps asserts that the "threat of ruinous litigation" is the only thing preventing it from
14 immediately scraping LinkedIn's website. Opp. at 3, 7. As detailed in LinkedIn's Motion,
15 however, LinkedIn has *not* threatened litigation and specifically ruled out the possibility of taking
16 immediate action against 3taps. Mot. at 4; LinkedIn's Request for Judicial Notice ("RJN") Ex. 6.
17 In its January 24, 2018 letter, LinkedIn specifically told 3taps that it would *not* take immediate
18 action against 3taps, even though 3taps's proposed scraping would violate LinkedIn's User
19 Agreement. RJN Ex. 6. 3taps argues that these statements can only be reasonably read as a threat
20 of impending harm. Opp. at 7-8. That reading is simply not plausible—especially because
21 LinkedIn *never sued* 3taps.¹

22 3taps's theory of an implied threat of immediate litigation is that LinkedIn "previously
23 engaged in aggressive litigation against hiQ." Opp. at 7, 13. But 3taps ignores that LinkedIn is
24 engaged in a lawsuit *brought by hiQ*. See RJN Ex. 3. That hiQ chose to file a lawsuit against
25 LinkedIn does not show that 3taps is faced with an immediate threat of ruinous litigation by
26 LinkedIn. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (holding that injury must be

27 ¹ Further, as discussed in greater detail in section I. C. below, 3taps's Amended Complaint does
28 not respond to the supposed "threat" in LinkedIn's letter because it does not seek relief
concerning LinkedIn's assertion that scraping would violate LinkedIn's User Agreement.

1 traceable to challenged action of the defendant and not the result of an independent action of a
 2 third party). LinkedIn's single pre-suit response letter to 3taps made no threat of action against
 3 3taps, and LinkedIn's defense of itself in a lawsuit hiQ filed cannot transform that
 4 correspondence into a threatened lawsuit against 3taps. In the absence of an actual threat of
 5 litigation, 3taps's entire theory of standing falls apart.

6 **B. 3taps Fails To Plead Facts Sufficient to Show An Actual or Imminent Injury.**

7 Even if LinkedIn had threatened 3taps or taken any action against it (which it did not), the
 8 Amended Complaint would still not satisfy Article III standing because 3taps does not identify
 9 any concrete activities it would engage in but for those supposed threats. All 3taps points to in its
 10 Opposition are the Amended Complaint's allegations that (1) 3taps is in the data scraping
 11 business, (2) LinkedIn data is valuable to data scrapers, and (3) 3taps is "ready, willing, eager and
 12 able to scrape." Opp. at 7. These bare conclusory allegations devoid of any specific facts are
 13 insufficient to satisfy 3taps's burden of establishing a real, concrete, and imminent injury. *See*
 14 *Giannini v. Am. Home Mortg. Servicing, Inc.*, No. C11-04489 TEH, 2012 WL 298254, at *4
 15 (N.D. Cal. Feb. 1, 2012) (dismissing action when factual allegations were insufficiently specific
 16 to sustain the declaratory judgment sought); *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 607–
 17 08 (D. Nev. 2011) (plaintiff failed to plead sufficient jurisdictional facts to establish a substantial
 18 case or controversy; vague and conclusory statements insufficient).

19 For example, the abstract assertion that data from LinkedIn is valuable to scrapers
 20 generally does not substantiate how LinkedIn's data has value to 3taps specifically, or how 3taps
 21 would suffer real, immediate harm if it cannot access that data. 3taps's failure to plead these facts
 22 leaves LinkedIn and the Court guessing as to 3taps's alleged injury. *See Carrico v. City & Cnty.*
 23 *of S.F.*, 656 F.3d 1002, 1007 (9th Cir. 2011) (failure to provide any description of intended
 24 conduct prevented court from being able to analyze whether plaintiffs faced a credible threat of
 25 prosecution). 3taps cites no case where a plaintiff established Article III standing without
 26 providing any actual facts about the subject of the action or the nature of the alleged harm. There
 27 is ample authority that threadbare allegations like those 3taps made are insufficient for Article III
 28 standing. *Id.* at 1008 (conclusory allegation is insufficient to establish standing); *Chapman v.*

1 *Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954–55 (9th Cir. 2011) (dismissing complaint when
 2 plaintiff failed to allege facts sufficient to satisfy Article III’s injury-in-fact requirement);
 3 *Escobar v. Brewer*, 461 F. App’x 535, 535–36 (9th Cir. 2011) (“Mere conclusory allegations are
 4 not enough to establish the ‘concrete and particularized’ injury required for standing under Article
 5 III.”); *Bihari v. Cross Roads of W. Gun Show*, No. SACV160718JVSEX, 2016 WL 11000618, at
 6 *2 (C.D. Cal. July 18, 2016) (bald assertions insufficient to establish Article III standing).

7 In an attempt to excuse itself from the mandates of Article III, 3taps asserts that providing
 8 enough facts to allege an actual injury would necessitate “giving LinkedIn a roadmap on how and
 9 when to implement [technical] measures,” and that disclosing “3taps’ intended business use of
 10 [LinkedIn] data” and “advance disclosure to LinkedIn of how the data will be monetized would
 11 be commercial suicide.” Opp. at 8. Even if there were a “commercial suicide” exception to
 12 Article III (which there is not), 3taps wouldn’t satisfy it. The Amended Complaint provides no
 13 information at all about what 3taps intends to do and 3taps has not provided that information in its
 14 opposition to LinkedIn’s first motion to dismiss, in its already amended complaint, or in this
 15 second opposition to a motion to dismiss. 3taps has had three opportunities to describe its
 16 putative business premised upon scraping LinkedIn, and it has yet to come up with even the
 17 outlines of a plausible venture.² The obvious inference is that this whole dispute is manufactured
 18 and that 3taps doesn’t really intend to do anything but try to get out from under Judge Breyer’s
 19 injunction. If 3taps expected the Court to credit it with a plausible plan for a business that would
 20 trigger an immediate threat of litigation harm from LinkedIn, then 3taps had the burden to
 21 provide sufficient facts to establish that it had a real plan to scrape LinkedIn data and that it
 22 would suffer a real, concrete, and imminent injury if prevented from doing so by LinkedIn’s
 23 redressable actions. *See Lujan*, 504 U.S. at 564 (profession of an intent to take an action without
 24 any description of concrete plans insufficient to establish actual or imminent injury). 3taps did
 25 not do so.

26
 27 ² The most it provides in the Opposition is that LinkedIn uses technical blocks to thwart scrapers.
 28 Opp. at 8. So what? This Court specifically acknowledged in *hiQ* that LinkedIn was entitled to
 continue using its general anti-scraping technical measures, which preserve site performance and
 stability.

1 **C. 3taps Fails To Show A Redressable Injury.**

2 3taps tries to parse out its three declaratory relief claims, seeking an advisory
3 interpretation of three different statutes or common law principles as being distinct controversies,
4 but it is clear from the Amended Complaint that there is only one common nucleus of operative
5 facts here—the hypothetical controversy over whether 3taps can freely scrape data from LinkedIn
6 in some unspecified fashion and use it for some unspecified purpose. The sole harm that 3taps
7 alleges is that an implied threat of litigation by LinkedIn prevents it from being able to scrape.
8 Am. Compl. ¶ 20; Opp. at 3. The advisory ruling that 3taps seeks—that three specific legal
9 theories would not apply to its hypothetical future scraping conduct—would not redress this
10 alleged harm, because 3taps does not even address all of the obvious legal theories by which
11 LinkedIn could seek such relief, nor that LinkedIn is entitled by this Court’s earlier rulings to use
12 its standard technical measures. *See Lujan*, 504 U.S. at 561 (standing requires that injury be
13 redressable by a favorable decision); *Hobbs v. Sprague*, 87 F. Supp. 2d 1007, 1012 (N.D. Cal.
14 2000) (no standing when court unable to discern whether Plaintiff’s alleged injury would be
15 redressed by a favorable decision).

16 3taps argues that it need not seek a ruling regarding “every possible legal theory” that can
17 be conceived of by “the boundless imagination of legal minds.” Opp. at 9. The imagination
18 needed here is to figure out what on earth type of business 3taps intends to conduct, how it
19 intends to scrape, what it intends to scrape, and how it intends to use the data. The fact that
20 3taps’s business is imaginary does not mean that LinkedIn has improperly invoked potentially
21 applicable legal theories, such as breach of contract, not addressed by 3taps.

22 To have standing, the Amended Complaint must seek an order capable of redressing
23 3taps’s alleged harm. That alleged harm is the implied threat of litigation that 3taps has cobbled
24 together from a single pre-suit letter from LinkedIn that expressly disclaimed any threat of
25 immediate action. *See* RJN Ex. 6. But the Amended Complaint completely ignores a key issue
26 expressly raised in that correspondence—that scraping en masse would be unauthorized by
27 LinkedIn’s User Agreement. *See id.* Thus, even if LinkedIn threatened litigation in its
28 correspondence (which it did not), the order 3taps seeks would not alleviate this threat, because

1 LinkedIn would be free to enforce the terms of its contracts regardless of this Court’s guidance on
 2 the statutory and common law trespass issues. This glaring omission serves to highlight that
 3 3taps’s true intention in filing this lawsuit is not to obtain legal clarity regarding whether it may
 4 scrape LinkedIn in some unspecified manner at some unspecified point in the future, but rather to
 5 obtain an advisory ruling contrary to Judge Breyer’s previous ruling that 3taps violates the CFAA
 6 by knowingly scraping a website without authorization. That is not the type of redressable harm
 7 Article III gives federal courts jurisdiction to remedy. *See Theme Promotions, Inc. v. News Am.*
 8 *Mktg. FSI*, 546 F.3d 991, 1010 (9th Cir. 2008) (declaratory judgment is only appropriate where it
 9 would completely resolve the concrete controversy.); Fed R. Civ. P. 57, Notes of Advisory
 10 Committee on Rules. (“A declaratory judgment is appropriate when it will ‘terminate the
 11 controversy’ giving rise to the proceeding.”).

12 **II. 3TAPS’S OPPOSITION CONFIRMS THERE IS NO RIPE CONTROVERSY** 13 **BETWEEN LINKEDIN AND 3TAPS.**

14 3taps bore the burden to plead facts sufficient to show a real, imminent, and concrete
 15 controversy that has reached the point where there is a specific need for the Court to declare the
 16 rights of the parties. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007);
 17 *Millennium Lab’ys, Inc. v. eLab Consulting Servs.*, No. 12CV1109 JM (DHB), 2012 WL
 18 2721919, at *3 (S.D. Cal. July 9, 2012). 3taps has failed to do so.

19 3taps admits that it has not scraped LinkedIn webpages. Opp. at 10. And while 3taps is
 20 correct that past actions are not always necessary for a ripe controversy (*see* Opp. at 10-11), when
 21 a plaintiff relies on an alleged future plan of activity, Article III requires that plaintiff to plead
 22 facts sufficient to establish that it has a real, imminent, and definite future plan. *See Merit*
 23 *Healthcare Int’l, Inc. v. Merit Med. Sys., Inc.*, 721 Fed. App’x 628, 630 (9th Cir. 2018)
 24 (declaratory judgment claim that there would be trademark confusion was insufficient where the
 25 plaintiff had not yet made any sales nor alleged or offered proof that it had “imminent plans” to
 26 do so); *Gadomski v. Patelco Credit Union*, No. 17-CV-00695-TLN-AC, 2022 WL 223878, at *5
 27 (E.D. Cal. Jan. 25, 2022) (profession of intent to take future action without any description of
 28 concrete plans does not support a finding of the “actual or imminent” injury required). The

1 Amended Complaint provides no *actual facts* indicating that 3taps has a real, definite and
 2 concrete plan to immediately scrape LinkedIn. Instead of providing any actual and specific facts,
 3 3taps argues that three conclusory statements in the Amended Complaint sufficiently alleged its
 4 plan to scrape LinkedIn data; specifically: (1) “that it is a data scraping business,” (2) that “3taps
 5 has decided to begin scraping publicly-available information on LinkedIn’s website,” and (3)
 6 “that it is ready, willing, and able to do so.” Opp. at 11-12. These bare conclusory statements are
 7 insufficient to establish a real and immediate controversy. The fact that 3taps failed to allege any
 8 real and specific facts regarding its proposed activity beyond these bare conclusions even after
 9 being given the opportunity to amend its complaint to include such facts highlights its inability to
 10 do so.

11 3taps apparently finds it “difficult to imagine what more” it could allege (Opp. at 12), but
 12 its imagination need go no further than the comparison 3taps invites the Court to make to the
 13 allegations in the *hiQ v. LinkedIn* dispute. While 3taps argues that its invocation of *hiQ*
 14 “highlight[s] the material similarities between the two companies” (Opp. at 13), all the
 15 comparison to *hiQ* highlights is the degree to which the Amended Complaint here is utterly
 16 devoid of jurisdictional facts. 3taps claims the pleadings are the same because both companies
 17 allegedly (1) are “in the business of access[ing] and us[ing] publicly-available facts from the
 18 internet,” (2) collect data to “enhance user experiences and safety,” in the case of 3taps, and to
 19 provide clients with insights about their employees in the case of *hiQ*, (3) use “automated means,”
 20 and (4) had “LinkedIn revoke[] [its] authorization to scrape its website.” Opp. at 13-14. In other
 21 words, both *hiQ* and 3taps intended to scrape LinkedIn. Those are the only “facts” 3taps pleads
 22 about its business. In contrast, *hiQ* included extensive allegations about how its business
 23 depended on information from LinkedIn webpages that it scrapes (RJN Ex. 3 ¶18), the nature of
 24 its business and how its products use data from LinkedIn webpages (*id.* ¶2, 6, 8, 17-18), how
 25 LinkedIn implemented technology blocks specifically against it and sent a cease-and-desist letter
 26 explicitly threatening litigation (*id.* ¶¶4, 25,34), LinkedIn’s development of allegedly competing
 27 products (*id.* ¶30), and how denial of access to data on LinkedIn webpages allegedly jeopardized
 28 specific client contracts and prospective relationships (*id.* ¶31). 3taps has not pled any similar

specific facts to support that it has a concrete and definite future plan to scrape LinkedIn data or that it has or will suffer an immediate and real injury-in-fact. It cannot rely on the facts in hiQ's pleadings because those facts are specific to hiQ. 3taps's bootstrapping effort fails.

III. IN ALL EVENTS, THE COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS.

3taps has engaged in unseemly judge-shopping in order to collaterally attack Judge Breyer's earlier permanent injunction against it, its primary investor, and its CEO. *See* Mot. at 2-5, 15. This alone is grounds for the Court to exercise its considerable discretion to dismiss this declaratory action.

3taps does not dispute the key facts and timing set forth in greater detail in LinkedIn's Motion: soon after this Court issued the preliminary injunction in *hiQ v. LinkedIn*, Greg Kidd, 3taps's CEO invested in hiQ. *Id.* 3taps then attempted to manufacture a controversy with LinkedIn by goading LinkedIn into threatening litigation. *Id.* LinkedIn did not take the bait, expressly stating that it had no intention of taking immediate action against 3taps. 3taps sued anyway, claiming it was related to hiQ and mischaracterizing the pre-suit correspondence with LinkedIn as a threat of litigation and broadly asserting an unspecified plan to scrape data "just like hiQ." *Id.* It then filed a motion to have its case related to the *hiQ v. LinkedIn* case pending before Judge Chen, in which it relied on its (recently manufactured and purchased) relationship with hiQ and further misrepresentations that it had received a cease-and-desist letter similar to hiQ and that the facts of the hiQ case were essentially identical to the facts leading to this case. *Id.* The implications of 3taps's conduct are clear—it was trying to manufacture a new dispute to get out from under the earlier injunction issued by Judge Breyer.

3taps's Opposition completely ignores this timeline. It does not dispute these facts or the inferences to be drawn from them. Unable to refute the facts evidencing that Greg Kidd and 3taps manufactured this lawsuit to get in this Court, 3taps tries to relitigate the motion to relate. *See* Opp. at 15-16. That motion was based on what we now know was a false premise—that there was some legitimate and relevant business relationship between hiQ and 3taps, not an after-the-fact investment designed to manufacture a dispute. 3taps's relitigation of the motion to relate,

1 asserting that the same defendant will lead to an overlap of facts and discovery is also wrong
2 here. In a declaratory judgment action like this one, it is the plaintiff's conduct that is really at
3 issue. 3taps is seeking a ruling on whether *its* activities would be unlawful. The very same
4 activities that were at issue in the *Craigslist v. 3taps* case. See RJN Ex. 7. Indeed, 3taps cited to
5 the *Craigslist v. 3taps* case in its opposition to LinkedIn's motion to dismiss the original
6 Complaint as evidence of the scraping activity 3taps allegedly plans to do to LinkedIn. See 3taps,
7 Inc.'s Opp'n to Defs.' Mot. to Dismiss at 11, Dkt. 53. The Court should exercise its discretion
8 and dismiss this declaratory action.

9 CONCLUSION

10 3taps lacks standing to pursue its declaratory relief claims, has failed to demonstrate an
11 actual controversy, and in all events the Court should exercise its discretion to dismiss this
12 unnecessary lawsuit brought for improper purposes.

13
14 Dated: March 9, 2022

Orrick, Herrington & Sutcliffe LLP

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